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In the

Supreme Court of the United States

OCTOBER TERM, 1956

CITY OF EL PASO,

Petitioner,

v.

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, L. D. MCCOMAS, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS and W. L. SUMMERS, together with THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT THE UNITED STATES OF AMERICA

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INDEX

Subject Index

	Page
Opinions Below	1-2
Jurisdiction	2
Questions Presented:	
I. Whether the Court below correctly decided the case upon the basis of the contracts alone	2-3
II. Whether the City of El Paso may take pay free from the Rio Grande an amount of water equal to sewage voluntarily discharged by it into the river	3
III. Whether obligation to "maintain" bridges includes obligation to tear out good bridges and rebuild with new structures of different basic design	3-4
IV. Whether quitclaim deed from City of El Paso to U. S. A. is valid	4
V. Whether City of El Paso was correctly enjoined from taking water from Rio Grande except as authorized by decree	4
Constitutions and Statutes Involved	4-5
Statement	5-9
Argument	9-42
I. In support of an affirmative answer to our Question I, page 2, and in reply to Question No. 1, Petition 3, and to Reasons for Granting Writ of Certiorari, Petition 13, and Argument Thereunder, Petition 14-20	13-24
II. In support of an affirmative answer to our Question II, page 2, and in reply to Question No. 2, Petition 4, and Argument Thereunder, Petition 20-23	24-29

Subject Index—(Continued)

	Page
III. In support of an affirmative answer to our Question III, page 2, and in reply to Questions Nos. 3 and 4, Petition 4, and Argument Thereunder. Petition 23-27	29-39
IV. In Support of an affirmative answer to our Question IV, page 3, and in reply to Question No. 5, Petition 4, and Argument Thereunder, Petition 28-30	39-40
V. In reply to confused last portion of petition	40-42
Conclusion	42
Appendices	43-81

Page

Cases

American Air Lines v. Civil Aeronautics Board, 178 F. 2d 903 21

Austin Mill & Grain Co. v. Brown County Water Improvement District No. 1, 128 S. W. 2d 829 38

Barber Asphalt Paving Co. v. Hezel, 56 S. W. 449 35

Charles Scribners Sons v. Marrs, 113 Tex. 11, 262 S. W. 722 29

Chidester v. City of Newark, 162 F. 2d 598 31

City of Crosbyton v. Texas-New Mexico Utilities Co., 157 S. W. 2d 418 10

City of El Paso v. Mendoza, 191 S. W. 2d 102 39

City of San Angelo v. Deutch, 145 Tex. 372, 91 S. W. 2d 308 10

Clayborn v. Gambill, 87 S. W. 2d 508 32

Cox v. Hart, 260 U. S. 427, 67 L. Ed. 332 21

Curdy v. Stafford, 88 Tex. 120, 30 S. W. 551 32

Davis v. Field, 222 S. W. 2d 697 32

Davis v. Texas Co., 232 S. W. 549 32

Farmers State Bank of Mineola v. Mincher, 290 S. W. 1090 12

Garrity v. Rainey, 112 Tex. 369, 247 S. W. 825 13

Gillam v. City of Fort Worth, 287 S. W. 2d 494 29

Gravis v. Rogers, 214 S. W. 2d 886 32

Great Northern R.R. Co. v. Delmar Co., 283 U. S. 686, 75 L. Ed. 1349 36

Page

Hudspeth County Conservation & Reclamation District No. 1 v. Robbins, 213 F. 2d 425 24

Huffman v. State Roads Comm., 137 Atl. 358, 152 Md. 566 35

Humble Oil & Ref. Co. v. Harrison, 146 Tex. 216, 205 S. W. 2d 355 32

Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525 22, 24

Kaderly v. Multnomah County Court, 52 Pac. 515, 32 Oreg. 560 35

L. & N. Ry. v. Godman, 4 N. E. 163 35

Lee v. Lee, 275 S. W. 2d 574 11, 12

Love v. Rockwall Independent School District, 194 S. W. 659 34

MacEvoy v. United States, 322 U. S. 102, 88 L. Ed. 1163 21

Madely v. Trustees of Conroe Independent School District, 130 S. W. 2d 929 34

Malone v. El Paso County Water Improvement District #1, 20 S. W. 2d 815 31, 34, 35

Mayfield v. Eubank, 278 S. W. 243 11

McNeal v. City of Waco, 89 Tex. 83, 33 S. W. 322 38

Nebraska v. Wyoming, 295 U. S. 40, 79 L. Ed. 1289 23, 24

Nebraska v. Wyoming, 325 U. S. 589, 89 L. Ed. 1815 23, 26

Pace v. Jackson, 284 S. W. 2d 340 12

Pitts v. Camp County, 120 Tex. 558, 39 S. W. 2d 608 32

Page

Portland Gasoline Co. v. Superior Marketing Co., 150 Tex. 533, 233 S. W. 2d 823 12

Rettig v. Houston West End Realty Co., 254 S. W. 765 32

Russell v. Ely, 2 Black (67 U. S.) 575 31

Ryan v. M. K. & T. R. Co., 65 Tex. 13 36

Saltmount Oil Corp. v. Imperial Crown Royalty Corp., 98 S. W. 2d 418 31

Soulsberry v. Maddix, 125 F. 2d 430 32

State v. Wilder, 98 S. W. 465 35

Stevenson v. Blake, 131 Tex. 103, 113 S. W. 2d 525 38

St. Louis S. W. Ry. Co. of Texas v. Davy Burnt Clay Ballast Co., 273 S. W. 630 31, 32

Sutton v. United States, 157 F. 2d 661 21

T. & N. O. R. Co. v. Galveston County, 148 Tex. 71, 169 S. W. 2d 713 38

Tennessee Electric Co. v. White County, 52 F. 2d 1065 30

Texas Agricultural Assn. of Edinburgh v. Hidalgo County Water Control & Improvement District #1, 125 F. 2d 829 38

Texas Farm Bureau Cotton Assn. v. Stovall, 113 Tex. 273, 253 S. W. 1101 12

U. S. v. Gerlach Livestock Co., 339 U. S. 725, 94 L. Ed. 1231 22

U. S. v. West Side Irrigation Co., 230 Fed. 284 11

Watkins v. Certain-Teed Products Corp., 231 S. W. 2d 981 32

Table of Authorities—(Continued)

	Page
Wood Motor Co. v. Nebel, 150 Tex. 86, 238 S. W. 2d 181	36
Young v. Rudd, 226 S. W. 2d 469	32

Statutes, Ordinances and Constitutions

32 Stat. 388—Reclamation Act	2, 4, 5, 20, App. B., pp. 61-64
33 Stat. 814—Extending above to Part of Texas	5, App. C., p. 64
34 Stat. 259—Extending Act to All of Texas	5, App. D., p. 65
36 Stat. 557—New Mexico "Enabling Act"	2, 5, App. F., p. 67
62 Stat. 928, 28 U. S. C. Sec. 1254(1)	2
U. S. Code, Title 43, Sec. 383	20, 21
Revised Civil Statutes of Texas:	
Article 7466e-1 (Rio Grande Compact)	3, App. A., pp. 43-61
Articles 7547, 7548, 7549, 7587, 7588, 7622, 7653, 7657, 7752, 7807-d-Sec. 6, and 7880-53	4, 5, App. K., pp. 72-81
Special Territorial Laws of New Mexico	2, 5, App. E., pp. 65-67
U. S. Constitution, Art. 1, Sec. 8, Cl. 1	21, 22
Texas Constitution, Art. 16, Sec. 59	5, 37, App. H., pp. 68-69
New Mexico Constitution, Art. 21, Sec. 7	2, 5, App. G., pp. 67-68
Charter, City of El Paso, Secs. 1, 2, and 92	10, App. J., pp. 70-72

Page

Other Authorities

10 Tex. Jur. 111, Sec. 64, et seq. 11
Kinney on Irrigation & Water Rights, 2d Ed. 26
Webster's International Dictionary 32

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BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT THE UNITED STATES OF AMERICA

OPINIONS BELOW

The opinion of the District Court does not accompany the Petition as an Appendix, but is to be found in the Record at page 1658 of Volume III, and is reported as

El Paso County Water Improvement District No. 1, et al., v. City of El Paso, 133 F. Supp. 894. The opinion of the Court of Appeals for the Fifth Circuit and the dissenting opinion (App. E of Petition) are reported at *243 F. 2d 927.*

JURISDICTION

Respondents do not concede jurisdiction to be in this Court on any of the grounds invoked by Petition, page 2, but it does have jurisdiction under *62 Stat. 928, 28 U. S. Code, Sec. 1254(1)*, should it believe such jurisdiction should be exercised.

QUESTIONS PRESENTED

It is the opinion of these Respondents that the Petition, pp. 3-5, does not accurately state the questions actually presented to this Court as the result of the decision herein by the Court of Appeals for the Fifth Circuit, and for that reason we present the following:

I

Whether, without determining the question of whether the rights of the parties in the waters of the Rio Grande originated under the Reclamation Act of June 17, 1902 *(32 Stat. 388)*, as extended to Texas, in conjunction with the Special Territorial Laws of New Mexico relating to the acquisition of water rights by the United States for irrigation works, together with the "New Mexico Enabling Act" *(36 Stat. 557), Article 21, Section 7*, of the Constitution of New Mexico, and the law of Texas, including its stat-

utes, or originated in the Rio Grande Compact of 1938 between the States of Colorado, New Mexico and Texas *(Article 7466 e-1, Revised Civil Statutes of Texas, U. S. Public Law No. 96, May 31, 1939, ch. 155, 53 Stat. 785)*, the Court of Appeals correctly decided the issues between the parties as to rights in the use of waters of the Rio Grande on the basis of their rights as established by the several contracts existing between them. Petitioner itself admits that the Court of Appeals passed on the Rio Grande Compact only by implication (Petition, p. 20).

The solution of this question lies in the determination of whether these contracts are valid. If they were, as Respondents contend, and as the Court of Appeals held, it is immaterial, as regards this case, where the water rights originated.

II

Whether the Court of Appeals correctly held that Petitioner, City of El Paso, had no right to take, pay free, from the bed of the Rio Grande an amount of fresh water equal to the sewage effluent which it currently discharges into the river bed.

III

Whether the primary obligation of the grantee in the quitclaim deed from the City of El Paso, as grantor, to the United States dated November 9, 1939, and the secondary obligation of the Respondent, El Paso County Water Improvement District No. 1, to "maintain" bridges across the Franklin Canal at certain street intersections excludes

the obligation to replace existing bridges, which have been maintained in a good state of repair by the grantee, with entirely new bridges of a completely different structural design.

IV

Whether the quitclaim deed from the City of El Paso to the United States of America (Plaintiff's Exhibit 18, R. I, 245), dated November 9, 1939, conveying all of the City's right, title and interest, if any, to the Franklin Canal extending through the City as a facility of the Rio Grande Federal Reclamation Project is valid.

V

Whether the District Judge properly enjoined the City of El Paso, and those acting for it, from taking water from the bed of the Rio Grande or from the Franklin Canal except in the manner and in accordance with its rights as determined by the decree.

CONSTITUTIONS AND STATUTES INVOLVED

It is thought that statutes and organic state laws are not involved in the determination of whether the Court of Appeals correctly decided the case, but if material to a determination of whether the holding of the Court of Appeals was correct, they are:

Article 7644e-1, Revised Civil Statutes of Texas (Rio Grande Compact of 1938)[1]; Act of June 17, 1902 (Reclamation Act), 32 Stat. 388, Chap. 1093, sections

[1] Appendix A.

4 and 8;[2] Act of Feb. 25, 1905 (33 Stat. 814), extending Reclamation Act to part of Texas;[3] Act of June 12, 1906 (34 Stat. 259), extending Reclamation Act to all of Texas;[4] Special Territorial Laws of New Mexico, 36th Legislative Assembly, Ch. 102, Sec. 22, Laws of 1905;[5] Special Territorial Laws of New Mexico, 37th Legislative Assembly, Ch. 49, Sec. 40, Laws of 1907;[6] The New Mexico "Enabling Act" (36 Stat. 557);[7] the Constitution of New Mexico, Article 21, Sec. 7;[8] the Constitution of Texas, Article 16, Sec. 59;[9] together with certain Articles of the Revised Civil Statutes of Texas set out in Appendix K.

STATEMENT

Believing that Petitioner's statement of the case as made by it, Petition, 5, et seq., is confusing and substantially incorrect in several respects, the following is submitted:

Respondent, El Paso County Water Improvement District No. 1, a conservation and reclamation district, duly organized under the laws of Texas, is the Texas unit of the Rio Grande Federal Reclamation Project established in 1906 by the United States Government under the Reclamation Act of 1902, and lying partly in two states, that is, New Mexico and Texas. All Project facilities are owned and operated by the United States of America[10] and not by the District as erroneously stated by Petitioner in its Statement and elsewhere in the Petition.

[2] Appendix B.
[3] Appendix C.
[4] Appendix D.
[5] Appendix E.
[6] Appendix F.
[7] Appendix G.
[8] Appendix H.
[9] Section 6 of the Reclamation Act, Appendix B.

This suit was filed by the District and five of its individual landowners, joined by the United States of America, against the City of El Paso, a Texas municipal corporation situated at the extreme western limit of the State of Texas on the north bank of the Rio Grande, for a declaratory judgment to establish the plaintiffs' claimed primary right to the use of the waters of that river and to enforce by injunction several written contracts between the United States and the plaintiff District on the one part and the defendant City of El Paso on the other part,[1] wherein, for stated considerations, the City was given the right to the secondary use of the waters of the Rio Grande, and, under certain circumstances, the right to use Project facilities.

The suit is also for the purpose of collecting money due from the City on these contracts and to establish by court judgment the incorrectness of the City's claim that the United States was primarily liable and the District secondarily liable to the City to repay to it the cost of tearing out existing bridges across the Franklin Canal, which bridges admittedly had been kept in a good condition of

[1] Contract dated Feb. 18, 1941, between the United States of America, the City of El Paso, Texas, and the El Paso County Water Improvement District No. 1 (Plaintiffs' Exhibit 27, R. I. 409); Contract between the United States of America, the City of El Paso, Elephant Butte Irrigation District, and El Paso County Water Improvement District No. 1, dated Dec. 1, 1944 (Plaintiffs' Exhibit 29, R. I. 426); Contract dated Aug. 10, 1949, between the City of El Paso and El Paso County Water Improvement District No. 1, approved by the United States (Plaintiffs' Exhibit 32, R. I. 560); Contract dated Dec. 1, 1949, between the City of El Paso, El Paso County Water Improvement District No. 1, United States of America and the Department of the Interior of the United States of America, Rio Grande Project, Hudspeth County Conservation and Reclamation District No. 1, Fort Quitman Land Company, et al. (Plaintiffs' Exhibit 33); and Contract dated June 22, 1950, between the City of El Paso and El Paso County Water Improvement District No. 1 (Plaintiffs' Exhibit No. 34, R. I. 586).

repair by the United States, and replacing them with completely new bridges of entirely different structural design, which claim of the City was based on the language of a quitclaim deed from it to the United States of America, dated Nov. 9, 1939,[1] wherein the City conveyed to the United States all of the City's right, title and interest in and to the Franklin Canal and appurtenances through the City (the major portion of which had already been acquired by the United States from private owners), and in said deed it was provided that the United States shall be obligated to "maintain" certain bridges which were already in existence across the Canal at specified street intersections, "contingent, however, upon appropriations being made by Congress," and by resolution on the same date as that of the deed, the Board of Directors of the District had obligated it to furnish funds for the maintenance of said bridges whenever such funds are not appropriated by Congress or furnished by the Federal Government. (Amended Complaint, R. I, 13-49.)

The City denied the validity of this quitclaim deed and all of the contracts between it and the United States and other plaintiffs, being Respondents here; claimed riparian rights for itself in the waters of the Rio Grande, and that Respondents have no rights to the waters of the Rio Grande except under the general appropriation laws of Texas: that it should have credit for sewage effluent discharged by it into the river; and sought to recover by way of counterclaim the cost of new bridges erected by the City across

[1] Plaintiffs' Exhibit No. 18, R. I, 245.

the Franklin Canal at three different street intersections (Amended Answer and Counter-Claim, R. I, 51-75.)

The District Judge adjudged and decreed that the quit-claim deed and all of the contracts between the parties were valid in their entirety except the contract of August 10, 1949, between the City of El Paso and the District relating to sewage effluent and other matters, which he held to be valid and binding only in its aspect as a rental of Project works for use in delivery of water to the City (R. III, 1756); with the result that the City was entitled to take "pay free" from the river bed on the City water front an aggregate quantity of Project water equal to the quantity of sewage effluent discharged currently into the river (R. III, 1757-1759); that the water of the Rio Grande to which the United States is entitled for the benefit of the Rio Grande Project and that belonging to Texas is definitely committed to the service, primarily, of the Rio Grande Project only by force of the Rio Grande Compact of 1938 between Colorado, New Mexico and Texas (R. III, 1753-1754); that the obligation of the grantee in the deed from the City of El Paso to the United States dated November 9, 1939, to "maintain" bridges also includes "any and all reasonable replacements, rebuilding, restoration, enlargement, reinforcement and repairs" (R. III, 1760); and that the City should recover from the District $44,427.59 as the cost to it of rebuilding two bridges, by reason of the District's secondary liability (R. III, 1760-1761).

On appeal the Court of Appeals held that all of the contracts were valid in their entirety and it was unnecessary

to go into the question of where the rights of the landowners of the District in the waters of the Rio Grande originated, and that it was so plain from the wording of the quitclaim deed of November 9, 1939, from the City to the United States, that the provision for maintenance of bridges did not include the tearing out of bridges which had been kept in good repair by the United States and replacing them with new structures of different design, that consideration of the District's contention that it could not be held liable for such new erections because of the prohibitions imposed on the incurrence of this nature of debt by the Texas Constitution was not required (Petition, App. "E", p. 41).

Thus the validity of the contracts between the parties was the entire basis of the holding of the Court of Appeals.

ARGUMENT

The Decision of the Court Below Is Clearly Correct.

As previously stated this suit was brought to enforce the several written contracts between the City of El Paso and Respondents.

The first of these was dated February 18, 1941, between the United States of America, the City of El Paso and the El Paso County Water Improvement District No. 1, which was later supplemented by the amendatory contract dated December 1, 1944, between the same parties and also the Elephant Butte Irrigation District. They appear in full as Plaintiffs' Exhibit 27, R. I, 401-421, and Plaintiffs' Exhibit 29, R. I, 427-443.

The purpose of the contracts was to furnish a supplemental supply of water for municipal purposes to the City of El Paso, within the limitations of the Reclamation Act.

Unquestionably these were contracts which the City had the power to make under Sections 1, 2, and particularly 92, of its charter (Appendix J), and it is equally clear that in doing so it was acting in its proprietary capacity, and not in the exercise of a governmental function, for it was contracting for the private interests of its inhabitants or itself. *City of San Angelo v. Deutch, 145 Tex. 372, 91 S. W. 2d 308; City of Crosbyton v. Texas-New Mexico Utilities Co., 157 S. W. 2d 418, 420-421, wr. ref. n.r.e.*

That these contracts were each supported by adequate consideration is obvious from reading them, for the proposition that mutual promises are adequate consideration for a contract is too well settled to require citation of authority.

Then came the contract of August 10, 1949, between the City of El Paso and the El Paso County Water Improvement District No. 1, approved by the United States (Plaintiffs' Exhibit 32, R. I, 509). It fixed the rights of the City, subject to the previous contracts, to take water from the Rio Grande under circumstances therein set forth, and in connection therewith to use Project facilities in the manner limited by the agreement.

It is plain from the language used therein that the primary object sought to be accomplished by the parties was the securing by the City of physical facilities for diversion

of such water as it could secure a right to take from the river and "avoiding litigation between themselves and to settle and compromise their respective claims." This settlement and compromise was itself adequate consideration for the agreement. *United States v. West Side Irrigation Company, 230 Fed. 284, 289-290 (affirmed, West Side Irrigation Company v. United States, 246 Fed. 212, C. C. A. 9).*

In the case at bar, the Respondents were under no obligation to allow the City of El Paso to use Project facilities at any price, and the City did not have the right to take water from the river at any time to the prejudice of Project water users. Respondents had protested an application to the State Board of Water Engineers by the City for authorization to use certain water from the river. They had a legal right to continue this protest, but under paragraph 12 of the contract gave it up on condition that the City consent to any permit granted thereunder being subject to the contract.

Texas law is firmly established that "valuable consideration" for a contract is either benefit to the promisor, or detriment to the promisee, or surrender by the promisee of some legal right *(Mayfield v. Eubank, 278 S. W. 244, wr. ref.; 10 Tex. Jur. 111, Sec. 64, et seq.)*.

No special consideration need be singled out or apportioned for each separate provision in the contract and a number of agreements covering more than one subject may be founded on one consideration. *Lee v. Lee, 275 S. W. 2d*

574, d.w.j.; Farmers State Bank of Mineola v. Mincher, 290 S. W. 1090, 1091, Tex. Comm. App.

An inspection of the various provisions and paragraphs of the contract of August 10, 1949, discloses adequate consideration to support all of the undertakings and obligations imposed on all parties by the terms thereof. Hence there is no lack of mutuality. *Pace v. Jackson, 284 S. W. 2d 340, Tex. Sup. Ct.; Texas Farm Bureau Cotton Assn. v. Storall, 113 Tex. 273, 253 S. W. 1101; Portland Gasoline Co. v. Superior Marketing Co., 150 Tex. 533, 243 S. W. 2d 823.*

Furthermore, the contract of August 10, 1949, was ratified and re-affirmed on December 1, 1949, by the City of El Paso by entry into the written contract bearing that date between itself, Respondent District, the United States of America, and others, as shown by Plaintiffs' Exhibit No. 33, R. I, 528, wherein it was provided in Paragraph V thereof that "said contract executed on the aforesaid 10th day of August, 1949, became effective as of the 23rd day of September, 1949, and now stands a valid and binding contract between the said City of El Paso, Applicant herein, and the said El Paso County Water Improvement District No. One, and said contract is now in full force and effect."

It would be impossible to more clearly express a stronger ratification and affirmation of a pre-existing agreement, but to make the thing doubly clear the City again in writing dated the 22nd day of June, 1950 (Plaintiffs' Exhibit No.

34, R. I, 536), agreed that the permit from the State Board of Water Engineers was subject to the contract of August 10, 1949, which was still in effect.

With a showing such as this we submit that the only thing which the Court of Appeals could rightly do was to do what it did do: Hold all of the contracts valid and adjudge the rights of the parties in accordance therewith.

But as Petitioner has sought to present to the Court various matters separately, we now discuss them as follows:

I

(In support of an affirmative answer to our Question I, *supra*, pages 2-3, and in reply to Question No. 1, Petition 3, and to Reasons For Granting Writ of Certiorari, Petition 13, and Argument Thereunder, Petition, 14-20.)

It is thought that none of the reasons advanced in the Petition, page 13, as to why the writ of certiorari should issue in this case are supportable. Two of them are on grounds of conflicting decisions. It is understood that for a higher court to review the decision of a lower appellate court on the ground that it is in conflict with prior decisions of its own or other courts of equal or higher standing the Petitioner must show that there is a well defined conflict upon a question of law upon the *same* state of facts, and such that one decision *would overrule the other* if both were rendered by the same court.[12]

[12]Garrity v. Rainey, 112 Tex. 369, 374, 247 S. W. 825, 827.

In any event it seems clear that the holding by the Court of Appeals in this case is not in conflict with any of the decisions or statutes cited by Petitioner. As we construe the opinion of the Court of Appeals, it held that it was not necessary to determine where the rights of the parties to the waters of the Rio Grande originated as they had fixed those rights as between themselves by means of the several contracts involved in this litigation. If that construction is not correct, there is still no conflict.

The holding is not contrary to the terms of the Rio Grande Compact of 1938, Art. 7466e-1 of the Revised Civil Statutes of Texas, set out in full as Appendix A herein.

That the Compact did recognize the primary right to the use of the waters of the Rio Grande to be already in the landowners of the Project, and if not, placed it there, seems clear.

The Federal filings of 1906 and 1908 (Plaintiffs' Exhibit 1a, R. I, 80), expressly stated that the proposal was to "construct certain irrigation works, *in connection with the so-called Rio Grande Project.*" The general map shows what was then contemplated as the Project area.

Storage in Elephant Butte Reservoir began in 1915 (Resch, R. I, 661), twenty-three years before the Compact was signed. It is within the judicial notice of this Court, and also shown by the record from the testimony of Raymond A. Hill, engineer advisor to the Texas Rio Grande Compact Commissioner, that the Rio Grande has always

been regarded as two streams, one ending at Fort Quitman, Texas, and the other beginning there (R. II, 1082-1083).

The Rio Grande Project lies above Fort Quitman, Texas, and the Bureau of Reclamation, under the Secretary of the Interior, to whom has been entrusted the management of Federal Reclamation Projects under authority of Congress, has openly and continuously since 1915 so operated the river for the primary use of the land owners of the Project that it could not fail to be common knowledge that such method was claimed and used as of right. In fact this was never questioned until the Hervey Administration of the City of El Paso did so in 1951.

Between 1934 and 1938 the Government, with the co-operation of Mexico, shortened the river between El Paso and Fort Quitman from 115 miles to 85 miles by straightening its meanders and confining it to a canal between parallel levees (Plaintiffs' Exhibit 112, R. II, 767-780, and testimony of J. F. Friedken, R. II, 781).

All of this was necessarily known to and understood by the commissioners for the three states, together with their attorneys and engineer advisors who prepared the Compact many years after the pattern of use had been established.

In fact the record shows that Raymond A. Hill, who was the engineer advisor to the Rio Grande Compact Commissioner for Texas throughout the negotiations leading up to the signing of the Compact in 1938, had knowledge of the river going back to 1913 when the foundations for Elephant Butte Dam were opened and they were just beginning to

pour concrete. This knowledge increased in detail as the years passed until in 1936 he was retained to assist the State of Texas and the two water districts composing the Rio Grande Project in the first suit by the State of Texas against the State of New Mexico in the Supreme Court of the United States involving the waters of the Rio Grande. The Compact as written embraces almost verbatim the reports submitted to the Commissioners by the engineer advisors (Hill, R. II, 1080-1083), and itself reflects that it was written to fit the situation which had already been created by the Rio Grande Project.

For example, Article XV of the Compact reads as follows:

> "*The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby*, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams." (Emphasis added.)

When the Project was determined to be feasible by the Secretary of the Interior in the exercise of the discretion vested in him by the Reclamation Act its area embraced those lands in New Mexico and Texas for which it was thought there could be furnished a safe water supply by the construction of the facilities then under consideration. The City of El Paso was never a part of this Project (R. I, 694).

Sheet 1, A5, of drawings filed by the United States in the office of the New Mexico Territorial Engineer, Feb-

ruary 2, 1910, being the General Map, which is part of Plaintiffs' Exhibit 1a, sent up as an original exhibit, contains the following:

> "Proposed Engle Reservoir, 185 feet deep at dam, and 40 miles long. Elephant Butte dam 265 feet high, requiring 410,000 cubic yards of rubble concrete. Capacity of reservoir 2,500,000 acre feet. *Average annual discharge of river estimated 800,000 acre feet. Will irrigate 180,000 acres in New Mexico and Texas. Mexico is to be furnished with 60,000 acre feet of water per annum at El Paso* by treaty of May 21, 1906. *Separate diversion dams and canal systems to be constructed for Palomas, Rincon, Mesilla and El Paso Valleys.*"

The preamble of the Compact recites that it is to remove all causes of present and future controversy "with respect to the use of the waters of the Rio Grande *above Fort Quitman, Texas* * * *."

Among the definitions of Article I thereof are the following:

> "(c) The term 'Rio Grande Basin' means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas *above Fort Quitman* * * *.
>
> "(k) *'Project Storage'* is the combined capacity of *Elephant Butte Reservoir* and all other reservoirs actually available for the storage of usable water below Elephant Butte and *above the first diversion to lands of the Rio Grande Project* * * *.
>
> "(l) 'Usable Water' is all water, exclusive of credit water which is in *project storage* and which is available for release *in accordance with irrigation demands, including deliveries to Mexico.*

"(m) 'Credit Water' is that amount of water in *project storage* which is equal to the accrued credit of Colorado or New Mexico or both.

"(n) 'Unfilled Capacity' is the difference between the total physical capacity of *project storage* and the amount of usable water then in storage.

"(o) 'Actual Release' is the amount of usable water released from the *lowest reservoir comprising project storage.*

"(p) 'Actual Spill' is all water which is actually spilled from *Elephant Butte Reservoir*, or is released therefrom for flood control, in excess of current demand on project storage * * *.

"(q) 'Hypothetical Spill' is the time in any year at which usable water would have spilled from *project storage* if *seven hundred and ninety thousand (790,000)* acre feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in *project storage* at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in *project storage* at the beginning of the calendar year following each actual spill."

In Article VII provision is made for adjustments with reference to increase of storage by New Mexico, when "actual releases of usable water from the beginning of the calendar year following the effective date of this Compact * * * *have aggregated more than an average of seven hundred and ninety thousand (790,000) acre feet per annum* * * *,*" while in Article VIII arrangement is made concerning releases by New Mexico "to the end that a *normal*

release of seven hundred and ninety thousand (790,000) acre feet may be made from project storage in that year."

Thus, while the Compact did not undertake to provide Texas with 790,000 acre feet of water per year, that quantity was regarded as a "normal release" to be made by those engaged in the physical operation of the river, and as a practical matter covers the 800,000 acre feet estimated by the Government in 1910 as the total annual flow of the Rio Grande at Elephant Butte Dam to take care of the estimated 180,000 acres of land in the Rio Grande Project in New Mexico and Texas, and when Mexico's 60,000 acre feet per year under the treaty of 1906 is deducted from the "normal release" of 790,000 acre feet the result is 70,000 acre feet less than the requirement for the Project as estimated by the Government 28 years before the Compact was signed.

From the language of the Compact quoted above the conclusion is irresistible that it was drafted to fit the pattern of the Rio Grande Project so that what water Texas did get pursuant to the agreement was to be subjected first to the needs and requirements of the landowners of the Project; with other uses secondary thereto and dependent upon whether in any given year there was water available in excess of Project requirements.

As was found by the trial judge in his opinion (R. III, 1682), "The Compact, instead of leaving the Texas share of the water open for disposition under the general water statutes of Texas, plainly directs same for irrigation in the Project."

Neither is the decision of the Court of Appeals in conflict with section 8 of the Reclamation Act. At all times since this case was first initiated in the District Court the Petitioner in discussing this Act has failed to quote this section in its entirety, apparently proceeding on the idea that if the omitted part be ignored by it long enough it will disappear.

The Act of June 17, 1902, was passed by the Fifty-Seventh Congress as Chap. 1093, and is set out as *32 Stat. 388 to 390.*[1] When it was carried into the United States Code it was broken up and distributed in various places in the Code. The only portion of section 8 in which Petitioner has ever shown any interest is that part of it which is codified as *Title 43, U. S. C., Section 383.* Section 8, however, in its entirety, reads as follows:

> "Sec. 8. That nothing in this Act shall be construed as affecting or intended to affect or in any way to interfere with the laws of any State or Territory relating to the Control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." *(32 Stat. 388, 390.)*

[1] Appendix B.

Particular attention is invited to the fact that the section consists of one sentence, the first part of which provides that it shall not affect state laws and that the Secretary shall proceed in conformity therewith, but the last clause says: "*Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.*"

That proviso was separately codified as *Section 372 of Title 43, U. S. Code.*

As a principle of statutory construction, the natural and appropriate office of a proviso is to restrain or qualify some preceding matter,[4] and in *MacEvoy v. United States, 322 U. S. 102, 107, 88 L. Ed. 1163, 1167,* the Supreme Court said: "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment * * *. Specific terms prevail over the general in the same or another statute which might otherwise be controlling'."

Consequently, the meaning of Section 8 of the Act as applied to the matter under consideration is the same as if it had been written:

> "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right, regardless of

[4] Cox v. Hart, 260 U. S. 426, 435, 67 L. Ed. 332, 337; American Air Lines v. Civil Aeronautics Board, 178 F. 2d 903, 906, Par. 1, C. A. 7; Sutton v. U. S., 157 F. 2d 661, 666, Par. 15, C. A. 5.

what the state law may be as to this (but as to other matters relating to irrigation, State law shall control)."

The Government in the exercise of its sovereignty through Congress has the power to do this, and did do this, by force of Article I, Section 8, Clause 1, of the Constitution,[15] as was recently held by the Supreme Court in *United States v. Gerlach Livestock Co., 339 U. S. 725, 738, 94 L. Ed. 1231, 1242*, wherein Mr. Justice Jackson for the court said:

> "Thus the power of Congress to promote the general welfare through large scale projects for reclamation, irrigation or other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretations of the power over navigation."

In *Ickes v. Fox, 300 U. S. 82, 95; 81 L. Ed. 525, 530*, it was said by the Supreme Court relative to an appropriation made by the United States under the Reclamation Act:

> "Appropriation was made *not for the use of government*, but under the Reclamation Act, for the use of landowners; *and by the terms of the law* and of the contract already referred to, *the water rights became the property of the landowners*, wholly distinct from the property right of the government in the irrigation works. * * * The Government was and remained simply a carrier and distributor of the water * * * with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works." (Emphasis added.)

[15] "The Congress shall have the power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general welfare of the United States." (Constitution, Art. I, Sec. 8, Cl. 1.)

The above language is included in a quotation cited with approval in the later case of *Nebraska v. Wyoming, 325 U. S. 589, 614, 89 L. Ed. 1815, 1829.*

Between 1906 and 1938, the date of the signing of the Rio Grande Compact between Colorado, New Mexico and Texas, the Federal Government spent literally millions of dollars in the construction of Rio Grande Project facilities on the basis of future repayment by the owners of lands which made the Project feasible. What the trial judge indicated (R. III, 1683) to be the reasonable belief of the United States with reference to the result of the Rio Grande Compact, executed thirty years after the Federal Filings of 1906 and 1908, applies with equal force here:

> "* * * the United States never supposed that its physical works and facilities were to be put in service to handle that part of the water destined for Texas, only to have the Project lands deprived of it in favor of other uses under the law of Texas, thus, perhaps, imperiling the repayment program between the Project and the United States."

It is not to be supposed that Congress intended for such result to be possible, but on the other hand it is proper to conclude that the very reason why the proviso was put into Section 8 of the Reclamation Act making the water rights appurtenant to the land was to make it impossible for the repayment program to be imperiled by state law in favor of other uses.

Certainly the decision of the Court of Appeals in this case is not in conflict in any way with the cases of *Nebraska v. Wyoming, 325 U. S. 589, 89 L. Ed. 1815; Nebraska v.*

Wyoming, 295 U. S. 40, 79 L. Ed. 1289; Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525, or *Hudspeth County Conservation & Reclamation District No. 1 v. Robbins, 213 F. 2d 425,* because in none of those cases was there any issue raised as to the applicability of the provisio in Section 8 of the Reclamation Act, and it was not even discussed.

The *Ickes-Fox* case and the last *Nebraska-Wyoming* case held that where the Government appropriated water under state law for use of Reclamation Project users the Government itself did not become the owner of the water rights but the landowners *did*, and this was recognized to be true by the Fifth Court of Appeals in the *Hudspeth-Robbins* case, where what the court held was that the case must be dismissed on account of the absence of the United States, an indispensable party.

Respondents in this case have never claimed that the United States owned the water rights but to the contrary, in keeping with the above authorities, have at all times herein affirmatively insisted that the water rights were appurtenant to the land irrigated as required by the proviso in Section 8 of the Act. The decision below, instead of being to the contrary, is in conformity therewith.

II

(In support of an affirmative answer to our Question II, *supra*, page 3, and in reply to Question No. 2, Petition 4, and argument thereunder, Petition 20-23.)

In holding that the City of El Paso could not take pay-free from the bed of the Rio Grande located in the City of

El Paso a quantity of water equal to the quantity of sewage effluent which is voluntarily discharged by the City into the bed of the Rio Grande, the Court of Appeals did not decide any state question, important or otherwise, in conflict with state law. The state court decisions cited by Petitioner on pages 20 and 21 of the petition in the first place did not involve the attempted exchange of sewage for fresh water; did not involve the attempted exchange of sewage for water which had been impounded at great expense and released from storage under Government control, and finally, in neither of those cases was there a contract, fixing the party's rights, as there was here.

The City has been voluntarily dumping its sewage effluent into the Rio Grande for more than forty years as a means of getting rid of it. (Testimony of Everett J. Brandt, R. III, 1590-1592.)

The annual discharge of sewage into the river for the last ten years has varied from a minimum of 10,412 acre feet in 1948 to 13,308 acre feet in 1953 (Defendant's Exhibit 20, R. II, 1154). As a matter of fact, with the stuff discharged into the river, the nuisance got so bad that J. T. Tillman, the Sanitary Engineer, in behalf of the City on September 29, 1953, wrote a letter to "Mr. W. F. Resch, Manager U. S. Reclamation Service" (Plaintiffs' Exhibit 100, R. I, 731), about "the terrible sewage odors coming from the Rio Grande River," and asking him to turn more water into the river in order to ameliorate the stench.

Even in the absence of contract the city would have no right to take fresh water from the stream in exchange for sewage outfall which it had voluntarily abandoned as a means of getting rid of it, for in *Nebraska v. Wyoming, 325 U. S. 589, 637, 89 L. Ed. 1815, 1841-1842,* this Court said:

> "We think it goes too far to say that when the return flows are *abandoned*, they may nevertheless be exchanged for upstream diversions by the same amount. When the return flows are *abandoned*, they become subject to appropriations downstream. See 2 Kenny, Irrigation & Water Rights, 2d ed., Par. 1114. They no longer remain subject to control for further use in the project. *Any claim to them or their equivalent under the form of an 'in lieu of' diversion is lost.*" (Emphasis added.)

But in the present case there is a contract dated August 10, 1949, between the defendant City of El Paso and plaintiff El Paso County Water Improvement District No. 1 (Plaintiffs' Exhibit No. 32, R. I, 509), which, we believe, settles the question.

Among the provisions of the contract are the following:

> "Whereas, there has been appropriated under the laws of New Mexico and Texas for and on behalf of the Rio Grande Federal Irrigation Project in New Mexico and Texas, comprising lands of the District and the Elephant Butte Irrigation District * * * and *the District claims all such appropriations cover all of the appropriatable waters of the Rio Grande River for the irrigation of lands in said districts;* and
>
> "Whereas, in normal operation of the Rio Grande Project there are intermittent flows of water in the Rio Grande River in the vicinity of the City in excess of the requirements of the District and the Hudspeth

District, resulting from Project developed drainage and return flow during periods of non-irrigation use, storm run-off, and unavoidable Project operating wastes due to sudden climatic changes occurring intermittently throughout the year, * * *; and

"Whereas, the *City has urged a claim in equity against the Rio Grande Project for sewage effluent placed in the Rio Grande River* from the City's operation of its sewage and water systems, a considerable amount of which effluent becomes commingled with the waters of the Rio Grande River and is available for use and is used by lands of the District for irrigation purposes; and

"Whereas, *it is the desire of the District and the City to cooperate to the end of avoiding controversy and litigation between themselves and to settle and compromise their respective claims* involving relative rights and priorities of use of the waters hereinabove referred to for domestic and irrigation purposes,

"Now, therefore, it is agreed:

"1. The District, subject to approval hereof by the Secretary of the Interior of the United States, will permit use by the City of Rio Grande Project works serving the District lands, for the purpose of this agreement, * * * *all as determined by the Project Manager of the Rio Grande Project.* * *."

(Paragraph 2 gives the city the right, under stated conditions, to take from the river water in excess of Project needs.)

* * * * *

(Paragraph 7 sets out the amounts which the City promises to pay for the use of Project facilities.)

* * * * *

"10. The City is now discharging and may in the future discharge into the Rio Grande sewage effluent

resulting from the use of water for municipal, industrial and domestic purposes obtained from sources other than the project water supply. It is expressly understood that in executing this contract, or in accepting the benefits thereof, *the City shall not be held to have in anywise relinquished, modified or impaired its title to, ownership of, and its right to control and determine the use and disposition of such effluent prior to its discharge into the Rio Grande. It is further understood that after such effluent is discharged into the Rio Grande it constitutes part of the Project water supply.*" (Emphasis added.)

The City avers on page 22 of its Petition that "* * * certainly every known principle of equity would, as held by the Trial Judge, give the City this right of exchange. Especially is this true when the very life of the City depends on getting water from the Rio Grande to supplement its water well supply."

We can only classify that as an exceptionally extravagant statement improvidently made, because in the record in this case it is shown by the City's own assertions that in the area of land adjacent to the City of El Paso for which it recently paid $714,145.35 for a brand new source of supply for water there is "At least 4 to 5 million acre feet of fresh water in the sands and gravel beneath the Mesa in Texas. It will be economically feasible to withdraw more than one half of this through wells. Recharge to the ground water reservoir is estimated by the Geological Survey to be at the rate of about 15 million gallons per day. Most of this can be intercepted by wells. *At least 25 to 30*

million gallons of fresh water per day, therefore, can be pumped from ground water reservoirs for a period of 100 years." (R. II, 1190-1191.)

Even if this were not the case, it is well recognized in Texas that the court may not consider the question of whether a contract made by a city's governing body is beneficial to the city, or should have been made at all. *Gillam v. City of Ft. Worth, 287 S. W. 2d 494, 499, Par. 11; Charles Scribners Sons v. Marrs, 114 Tex. 11, 262 S. W. 722, 728, Par. 12.*

In the present case the Court of Appeals held that the contract of August 10, 1949, is valid and prevents the City from exchanging sewage for fresh water, and that holding is in no way in conflict with state law.

III

(In support of an affirmative answer to our Question III, *supra*, pages 3-4, and in reply to Questions 3 and 4, Petition 4, and argument thereunder, Petition 23-27.)

In holding that the word "Maintain", as used in the ordinance of the City of El Paso, dated November 9, 1939, and the quitclaim deed from Petitioner to Respondent United States of America did not make Respondent District secondarily liable for the tearing out of existing bridges which had been kept in good state of repair by the Federal Government and the replacement of same by structures of entirely different design, the Court of Appeals in this case is not in conflict with United States Court of Appeals for

the Sixth Circuit, nor with any other Federal Court decision which has been cited by Petitioner nor with the law of Texas as established by the decisions of Texas appellate courts.

The case of *Tennessee Elec. Co. v. White County, 52 F. 2d 1065*, went up from Tennessee to begin with, and in addition to that the facts are not comparable anyway. There, the power company proposed to *erect and maintain* bridges at specified places, and agreed to bear the "cost of continued maintenance" thereof.

The bridges were washed out by flood.

The situation in the present case is entirely different. Petitioner wanted to tear out existing bridges which admittedly were in good repair and replace them with entirely new structures of different basic design, which was something certainly not within the contemplation of the parties when the City executed the deed in question, appearing in the record as Plaintiffs' Exhibit No. 18, R. I. 245.

This deed quitclaims to the Government all "right, title and interest" in all parts of described streets and alleys and provides that "this conveyance is subject to the condition that the United States shall be obligated to maintain the said bridges at said described crossings, contingent, however, upon appropriations being made therefor by Congress; and there is further reserved to the said City of El Paso the right to *construct* and *maintain* at its own cost such additional bridges and other structures across

said canal other than those hereinabove designated as it may deem necessary. (Emphasis ours.)

Of course, Texas law alone governs the construction, and determines the validity and effect of any written instrument disposing of Texas realty. *Russell v. Ely, 2 Black (67 U. S.) 575, 578; Chidester v. City of Newark, 162 F. 2d 598, C. C. A. 3; Saltmount Oil Corp. v. Imperial Crown Royalty Corp., 90 S. W. 2d 418, 423, d. w. j. (Tex. Civ. Apps.)*

The citizens of this state customarily use words with the meaning attributed to them by a standard dictionary, and the courts of Texas do the same thing.

For example, the Texas Court of Civil Appeals at El Paso, in the case of *Malone v. El Paso County Water Improvement District No. 1, 20 S. W. 2d 815, 820*, wherein the State Supreme Court refused a writ of error, said:

> "The term 'maintain' in *Webster's International Dictionary, which has become, in effect, a law book* on questions, is defined to mean 'to hold or keep in any particular state or condition'; 'to support'; 'to sustain'; 'to uphold'; 'to keep up'; 'to keep possession of'; 'not to surrender'; 'to bear the expense of'." (Emphasis added.)

Several years earlier the Texas Court of Civil Appeals at Dallas had quoted this definition of the word "maintain" from the same dictionary, with respect to which it said in *St. Louis S. W. Ry. Co. of Texas v. Davy Burnt Clay*

Ballast Co., 273 S. W. 630, 633 (reversed on other grounds, 285 S. W. 295):

> "We can well accept this definition as our guide, for, as said in the case of Brenn v. City of Troy, 60 Barb. (N. Y.) 417, 421:
>
> "' '*Websters* (International) *Dictionary* * * * *has become in effect a law book on questions of construction*'." (Emphasis added.)

The language of a deed is the language of the grantor, and any doubt as to its construction is to be resolved against him in favor of the grantee. *Curdy v. Stafford, 88 Tex. 120, 30 S. W. 551, 552.*[16]

The words used in the instrument are to be taken in their common acception, rather than in a technical sense.[17] Every word in a deed, if possible, should have its proper effect and the meaning of one word or phrase may be ascertained by comparing it with other words or phrases in the same instrument. *Soulsberry v. Maddix, 125 F. 2d 430, 434, Par. 14, cert. den. M. r. S., 317 U. S. 643.*

Applying these principles to the instrument under consideration, we think we can say with confidence that the grantee in the deed and the Board of Directors of the plaintiff District, when they undertook by resolution to

[16] Clayborn v. Gambill, 87 S. W. 2d 508, 510, wr. ref.; Rettig v. Houston West End Realty Co., 254 S. W. 765, 768, Tex. Sup.; Gravis v. Rogers, 214 S. W. 2d 886, 889, Par. 9, wr. ref.; Davis v. Field, 222 S. W. 2d 697, 699, wr. ref. n. r. e.; Young v. Rudd, 226 S. W. 2d 469, 473, Par. 5, wr. ref. n. r. e.; Humble Oil & Ref. Co. v. Harrison, 146 Tex. 216, 205 S. W. 2d 355, 360.

[17] Also Pitts v. Camp County, 120 Tex. 558, 39 S. W. 2d 608, 615-616; Davis v. Texas Co., 222 S. W. 549, 554, Par. 6, reversed on other grounds, 114 Tex. 92, 254 S. W. 304; Watkins v. Certain-Teed Products Corp., 231 S. W. 2d 981, 984, Par. 4.

bind the District to furnish funds to "maintain" the bridges when and if the government didn't do so, would have sustained a major shock if someone had told them that fifteen years later the grantor would urge that the word included the obligation to tear out thirty-one bridges in a good state of repair and rebuild them with new and different structures at a total ultimate cost of about six hundred thousand dollars.

The word "maintain" in its common acceptance simply does not mean anything like that. The distinction between construction and maintenance was recognized by the City of El Paso in the deed itself when it reserved the right to *construct* and *maintain*, at its own cost, additional bridges across the canal at other points. If the word "maintain" includes the word "construct," as the City now contends, then use of both words should not have been made.

The City was accustomed to these words in their proper sense. In an ordinance dated December 11, 1913 (D. 2, R. II, 855), there was a proviso that the government was to *construct*, erect and *maintain* nine bridges, and *erect* and *maintain* and *replace* all bridges east of Cotton Avenue.

It is significant that in the ordinance of September 5, 1939, as amended November 9, 1939 (Plaintiffs' Exhibits Nos. 16 and 17, R. I, 235 and 239), no words *which* in their ordinary meaning comprehend the idea of new or different construction were used. As shown by the quitclaim deed itself, the United States had already performed the obli-

gation imposed on it by the ordinance of December 11, 1913, for this deed enumerates and locates thirty-one bridges crossing the canal "heretofore constructed by the Bureau of Reclamation of the United States" (R. I. 247). Once to construct 31 bridges without expense to the City would seem to be enough, and for the Government to keep those 31 bridges in repair without having to tear them out, though in sound condition, and replace them with entirely new bridges of a different structural design would appear to be what the parties reasonably contemplated on November 9, 1939. This the Government has done.

Upon whom would rest the burden of constructing completely new bridges of entirely different design, whenever the City should consider them desirable, at any of the locations of the 31 bridges which the grantee was to "maintain" was something which the contract simply did not cover.

The facts relating to the deed in question here bear no resemblance to those of any case with which Petitioner claims a conflict exists.

Repeatedly it has been held by Texas courts and others that the word "maintain" excludes the cost of new structures and does not mean to provide or construct, but to keep up and preserve. *Madeley v. Trustees of Conroe Independent School District*, 130 S. W. 2d 929, 933 (Tex. Civ. Apps., Beaumont); *Love v. Rockwall Independent School District*, 194 S. W. 659, 661, wr. ref. (Tex. Civ. Apps., Dallas); *Malone v. El Paso County Water Improve-*

ment District No. 1, 20 S. W. 2d 815, 820, wr. ref.; L. & N. Ry. v. Godman, 4 N. E. 163, Ind.; Barber Asphalt Paving Co. v. Hezel, 56 S. W. 449 (Mo.); State v. Wilder, 98 S. W. 465, 467 (Mo.); Huffman v. State Roads Comm., 137 Atl. 358, 364, 152 Md. 566; Kaderly v. Multnomah County Court, 52 Pac. 515, 516, 32 Oreg. 560.

The holding of the Court of Appeals in this case is unquestionably not only not contrary to the decisions of the appellate courts of Texas, but in conformity therewith.

Wholly aside from and in addition to all of the above, there is another reason entirely sufficient in itself as to why the word "maintain" in the quitclaim deed should not be construed to include the obligation on the part of the Respondent District to provide new bridges as a matter of secondary liability. The Court of Appeals thought the true meaning of the word was so clear that it was not necessary to consider this additional reason, so we now present it:

The only manner in which any sort of secondary liability on the part of the plaintiff El Paso County Water Improvement District No. 1 could exist arises from the action of its Board of Directors on November 9, 1939, in passing a resolution whereby "it obligated itself to the City of El Paso to furnish funds for the maintenance of bridges at points specifically enumerated in said city ordinance of September 5, 1939, and in the deed of November 9, 1939, made in pursuance thereof, whenever such funds are not appropriated by Congress or furnished by the Federal

Government or its agencies," as pleaded by plaintiffs in Paragraph X of the Amended Complaint (R. I, 23).

If that resolution, under all of the circumstances of this case, resulted in a contract between the City of El Paso and the plaintiff District, then in construing that contract it must be held that the obligation to furnish funds to "maintain" the bridges when the Government fails to do so excludes the obligation to furnish funds for the erection of new structures and is limited to the obligation of furnishing funds for the repairing, keeping up and preserving only those specifically designated bridges, because while the Board of Directors had the power to obligate the District for ordinary current expenses to be satisfied out of current revenues, it was powerless to obligate it for any debt of the kind and character insisted upon by defendant City.

It was long ago said by the Supreme Court of this state that "Parties to a contract are presumed to intend that it shall be enforced. It is not to be presumed that they deliberately executed an agreement, knowing that it was invalid." *Ryan & Co. v. M. K. & T. R. Co., 65 Tex. 13, 16.*

Further, it is the unquestionable rule in both federal and state courts that if a contract is susceptible of two constructions, one of which will render it valid and the other invalid, construction validating it must prevail. *Great Northern Railroad Co. v. Delmar Co., 283 U. S. 686, 691, 75 L. Ed. 1349, 1353; Wood Motor Co. v. Nebel, 150 Tex. 86, 238 S. W. 2d 181, 183, Par. 1.*

If the word "maintain" in the contract under consideration be construed to include the cost of new erections, then the contract is void and the District is under no obligation at all because in violation of subsection (c) of Section 59 of Article 16 of the Constitution of the State of Texas, which is set out in full as Appendix H. This empowers the Legislature to "authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment," but restrict this power by adding the following proviso as the last clause:

> "provided the Legislature shall not authorize the issuance of any bonds *or provide for any indebtedness* against any reclamation district *unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted.*" (Emphasis added.)

The Supreme Court of Texas has laid down the rule that the word "debt" as used in a similar section of the Constitution means any pecuniary obligation imposed by contract except such as was at the time of agreement, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the particular political subdivision of the state making the agreement. If the item does not arise as an item of ordinary expenditure in the daily functioning of the agency or if it is not to be paid out of funds then in the treasury legally applicable thereto, it is a debt condemned by the Constitution unless provision for its payment is made at the time

the obligation is incurred. *T. & N. O. R. Co. v. Galveston County, 141 Tex. 34, 169 S. W. 2d 713, 715, Par. 3; McNeal v. City of Waco, 89 Tex. 83, 33 S. W. 322; Stevenson v. Blake, 131 Tex. 103, 113 S. W. 2d 525, 527, Par. 1.* Hence, a contract indemnifying against future loss, without simultaneous provisions for raising revenue to pay it, is void, as was held in *T. & N. O. R. Co. v. Galveston County*, supra.

Respondent District was absolutely powerless to make a valid contract with the City or anyone else to "maintain" the bridges, in the sense of rebuilding them, without prior vote of its property owners, is definitely established by the following decisions of Texas' highest court and the Federal Fifth Court of Appeals: *Austin Mill & Grain Co. v. Brown County Wtr. Imp. Dist. No. 1, 128 S. W. 2d 829, affirmed 135 Tex. 140, 138 S. W. 2d 523; Texas Agricultural Association of Edinburgh v. Hildago County Water Control & Improvement District No. 1, 125 F. 2d 829, Par. 6, C. C. A. 5, cert. den. 317 U. S. 643, 87 L. Ed. 518; Texas & New Orleans Railway Company v. Galveston County, 141 Tex. 34, 169 S. W. 2d 713.*

Respondent District didn't own the bridges. They were and are owned by the United States of America under deed from the Franklin Irrigation Co., dated October 14, 1912, Plaintiffs' Exhibit 14 (R. I, 214), and quitclaim deed from the City of El Paso, dated November 9, 1939, Plaintiffs' Exhibit 18 (R. I, 245). If there was a resolution of the District's Board of Directors, the existence of which defendant denied, and it should be construed under the

circumstances as a contract with the City, it could be at most a contract of indemnity, and contingent at that.

The Court of Appeals' decision was, therefore, in conformity with Texas law rather than in conflict with it.

IV

(In support of affirmative answer to our Question IV, page 4, *supra*, and in reply to Question No. 5, Petition, 4, and argument thereunder, Petition, 28-30.)

The Court of Appeals correctly decided that the ordinance and quitclaim deed of November 9, 1939, whereby the City conveyed to the United States its interest, if any, in the Franklin Canal, a Rio Grande Federal Reclamation Project facility, are valid.

There are other good answers to Petitioner's contention that they are void, but the shortest one is that the Texas Court of Civil Appeals at El Paso, in the case of *City of El Paso v. Mendoza, 191 S. W. 2d 102, 105*, has already held that this same deed now under consideration is valid. The ordinance was merely a step preliminary to the deed. The Supreme Court of Texas refused the City's application for writ of error in that case for want of merit. As we understand it, that decision is binding on the Federal Courts.

As a matter of fact, Petitioner, in the trial court in that case, not only judicially admitted that this same deed to the United States was valid but actually urged it as a

defense to the liability asserted against it therein, as shown here by Plaintiffs' Ex. 19, R. I, 250-298, which is a certified copy of the trial court proceedings in that case.

V

Beginning with that paragraph marked V on page 30, and extending to its conclusion, the Petition seems to be in a state of confusion out of which we have not been able to bring order, but we gather that the intent is made to present the proposition that the Court of Appeals' affirmance of the trial court's action of enjoining the City of El Paso and those acting for it from taking water from the bed of the Rio Grande or from the Franklin Canal except in the manner and in accordance with the rights of the City as fixed by the decree constitutes a ruling of which this Court should take serious notice. We cannot think so.

It was proven by Respondents on the trial of the case that the City of El Paso under the leadership of its Mayor Fred Hervey had assumed to take the law into its own hands and withdraw water from the Rio Grande and the Franklin Canal at its own pleasure in unlimited amounts in violation of its solemn contracts previously executed, which it, for itself, adjudged to be void.

For instance, His Honor, Mayor Fred Hervey, testified by deposition:

> "Question: I call your attention to Request No. 63, 'During the year 1953, the City of El Paso withdrew from the Franklin Canal or the Rio Grande in excess of the amount of water which the City of El Paso was entitled to take by reason of its ownership of first-

class water right lands within the Rio Grande Federal Reclamation Project, and persisted in such excess withdrawals after it had been notified of its overdraft by the Rio Grande Project Superintendent.' You have denied that. On what basis?

"Answer: Well, again, we do not recognize the Rio Grande Project, or the Federal Reclamation Project, I should say. (R. I., 567.)

"And the water we took out of the Rio Grande river was, in our opinion, not owned by the El Paso Water Improvement District No. 1.

* * * * *

"No. Any water we took out of the Rio Grande was not 'by reason of its ownership of first class water right lands.'

"Question: What was it by reason of?

"Answer: It was by reason that there was water running down the Rio Grande and that the Texas Board of Water Engineers had allocated 27,000 acre feet to the City of El Paso.

"Question: You are just brushing all these contracts aside; the contracts of February 18, 1941; December 1, 1944; August 10, 1949; and June 22, 1950, I think it is; all of those as far as you are concerned are just scraps of paper?

"Answer: No, they are all illegal." (R. I., 568.)

And in answer to the first question, R. I, 569:

"We took water out of the Rio Grande that we were justly entitled to from the effluent that we were putting into the river and the amount of water allocated to us by the Texas Board of Water Engineers. We just took water—we didn't take it by reason of anything—we just took water, period, that belonged to us."

There is much more in the record concerning the City's arrogant action but the above is a fair sample.

To prevent conduct such as this is what injunctions are for. Citation of authorities seem unnecessary.

CONCLUSION

It is respectfully submitted that the action of the Court of Appeals for the Fifth Circuit with reference to each matter presented by the Petition, is clearly correct; that it is in no way in conflict with either Federal or State decisions; and did not determine any question, theretofore undetermined, of importance sufficient to warrant review by this Court.

Respectfully submitted,

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APPENDIX A

Revised Civil Statutes of Texas

Art. 7466e-1. Rio Grande Compact of 1938

Section 1. The Rio Grande Compact entered into and signed at Santa Fe, New Mexico, on March 18, 1938, by M. C. Hinderlider, Commissioner for the State of Colorado, Thos. M. McClure, Commissioner for the State of New Mexico, and Frank B. Clayton, Commissioner for the State of Texas, and approved by S. O. Harper, Commissioner representing the United States of America, an original copy of which has been deposited in the office of the Secretary of State for the State of Texas, is hereby, in all respects, ratified and confirmed; said Compact being as follows:

RIO GRANDE COMPACT

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quit man, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable appointment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado—M. C. Hinderlider
For the State of New Mexico—Thomas M. McClure
For the State of Texas—Frank B. Clayton

who after negotiations participated in by S. O. Harper, appointed by the President as the representative of the United States of America, have agreed upon the following Articles, to-wit:

ARTICLE I

(a) The State of Colorado, the State of New Mexico, the State of Texas, and the United States of America, are hereinafter designated "Colorado," "New Mexico," "Texas," and the "United States," respectively.

(b) "The Commission" means the agency created by this Compact for the administration thereof.

(c) The term "Rio Grande Basin" means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado.

(d) The "Closed Basin" means that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.

(e) The term "tributary" means any stream which naturally contributes to the flow of the Rio Grande.

(f) "Transmountain Diversion" is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin, exclusive of the Closed Basin.

(g) "Annual Debits" are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) "Annual Credits" are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) "Accrued Debits" are the amounts by which the sum of all annual debits exceeds the sum of all annual credits over any common period of time.

(j) "Accrued Credits" are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) "Project Storage" is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of two million, six hundred and thirty-eight thousand, eight hundred and sixty (2,638,860) acre-feet.

(l) "Usable Water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) "Credit Water" is that amount of water in project storage which is equal to the accrued credit of Colorado or New Mexico or both.

(n) "Unfilled Capacity" is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) "Actual Release" is the amount of usuable water released in any calendar year from the lowest reservoir comprising project storage.

(p) "Actual Spill" is all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) "Hypothetical Spill" is the time in any year at which usable water would have spilled from project storage if seven hundred and ninety thousand (790,000) acre-feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

ARTICLE II

The Commission shall cause to be maintained and operated a stream gaging station equipped with an automatic water stage recorder at each of the following points, to-wit:

(a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley;

(b) On the Conejos River near Magote;

(c) On the Los Pinos River near Ortiz;

(d) On the San Antonio River at Ortiz;

(e) On the Conejos River at its mouths near Los Sauces;

(f) On the Rio Grande near Lobatos;

(g) On the Rio Chama below El Vado Reservoir;

(h) On the Rio Grande at Otowi Bridge near San Ildefonso;

(i) On the Rio Grande near San Acacia;

(j) On the Rio Grande at San Marcial;

(k) On the Rio Grande below Elephant Butte Reservoir;

(l) On the Rio Grande below Caballo Reservoir.

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the Compact; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gaging stations shall be equipped, maintained, and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method and frequency of measurement at such stations shall be such as to secure reliable records at all times.

ARTICLE III

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured

at or near Lobatos, in each calendar year, shall be ten thousand (10,000) acre-feet less than the sum of those quantities set forth in the two (2) following tabulations of relationship, which correspond to the quantities at the upper index stations:

Discharge of Conejos River

Quantities in thousands of acre-feet

Conejos Index Supply (1)	*Conejos River at Mouths (2)*
100	6
150	20
200	45
250	75
300	109
350	147
400	188
450	232
500	278
550	326
600	376
650	426
700	476

Intermediate quantities shall be computed by proportional parts.

(1) Conejos Index Supply is the natural flow of Conejos River at the U. S. G. S. gaging station near Mogote during the calendar year, plus the natural flow of Los Pinos River at the U. S. G. S. gaging station near Ortix and the natural flow of the San Antonio River at the U. S. G. S. gaging station at Ortiz, both during the months of April and October, inclusive.

(2) Conejos River at mouths is the combined discharge of branches of this River at the U. S. G. S. gaging stations near Los Sauces during the calendar year.

Discharge of Rio Grande Exclusive of Conejos River

Quantities in thousands of acre-feet

Rio Grande at Del Norte (3)	*Rio Grande at Lobatos less Conejos at Mouths (4)*
200	60
250	65
300	75
350	86
400	98
450	112
500	127
550	144
600	162
650	182
700	204
750	229
800	257
850	292
900	335
950	380
1,000	430
1,100	540
1,200	640
1,300	740
1,400	840

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Norte is the recorded flow of the Rio Grande at the U. S. G. S. gaging station near Del Norte during the calendar year (measured above all prin-

cipal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at mouths is the total flow of the Rio Grande at the U. S. G. S. gaging station near Lobatos, less the discharge of Conejos River at its mouths, during the calendar year.

The application of these schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging station; (b) any new or increased depletion of the runoff above inflow index gaging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the Closed Basin, Colorado shall not be credited with the amount of such water delivered, unless the proportion of sodium ions shall be less than forty-five (45) per cent of the total positive ions in that water when the total dissolved solids in such water exceeds three hundred and fifty (350) parts per million.

ARTICLE IV

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August, and September, shall be that quantity set forth in the following tabulation

of relationship, which corresponds to the qauntity at the upper index station:

Discharge of Rio Grande at Otowi Bridge at San Marcial
Exclusive of July, August, and September

Quantities in thousands of acre-feet

Otowi Index Supply (5)	*San Marcial Index Supply (6)*
100	0
200	65
300	141
400	219
500	300
600	383
700	469
800	557
900	648
1,000	742
1,100	839
1,200	939
1,300	1,042
1,400	1,148
1,500	1,257
1,600	1,370
1,700	1,489
1,800	1,608
1,900	1,730
2,000	1,856
2,100	1,985
2,200	2,117
2,300	2,253

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi Index Supply is the recorded flow of the Rio Grande at the U. S. G. S. gaging station at Otowi Bridge near San Ildenfonso (formerly station near Buck-

man) during the calendar year, exclusive of the flow during the months of July, August, and September, corrected for the operation of reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial Index Supply is the recorded flow of the Rio Grande at the gaging station at San Marcial during the calendar year exclusive of the flow during the months of July, August, and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August, and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial, near San Acacia, and of the release from Elephant Butte Reservoir, to the end that the records at these three (3) stations may be correlated.

ARTICLE V.

If at any time it should be the unanimous finding and determination of the Commission that because of changed physical conditions, or for any other reason, reliable rec-

ords are not obtainable, or cannot be obtained at any of the stream gaging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the Commission, will result in substantially the same results, so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made.

ARTICLE VI.

Commencing with the year following the effective date of this Compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed one hundred thousand (100,000) acre-feet, except as either or both may be caused by holdover storage water in reservoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colorado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed two hundred thousand (200,000) acre-feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in

the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in storage at all times to the extent of its accrued debit. In computing the magnitude of accrued credits or debits, New Mexico shall not be charged with any greater debit in any one year than the sum of one hundred fifty thousand (150,000) acre-feet and all gains in the quantity of water in storage in such year.

The Commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of one hundred and fifty thousand (150,000) acre-feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided, that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the Commissioners for the States having accrued credits authorize the release of part, or all, of such credits

in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado or New Mexico, or both, at the beginning of the year shall be cancelled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionally to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded in reservoirs above San Marcial, such credits and debits shall be reduced annually to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water in such reservoirs during the year.

ARTICLE VII.

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than four hundred thousand (400,000) acre-feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this Compact, or from the beginning of the calendar year following actual spill, have aggregated more

than an average of seven hundred and ninety thousand (790,000) acre-feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the total actual release and releases at such average rate; provided, further, that Colorado or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the State or States so relinquishing shall be entitled to store water in the amount of the water so relinquished.

ARTICLE VIII.

During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to six hundred thousand (600,000) acre-feet by March 1st and to maintain this quantity in storage until April 30th, to the end that a normal release of seven hundred and ninety thousand (790,000) acre-feet may be made from project storage in that year.

ARTICLE IX.

Colorado agrees with New Mexico that in event the United States or the State of New Mexico decides to construct the necessary works for diverting the water of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions from the San Juan River, or its tributaries, are protected.

ARTICLE X.

In the event water from another drainage basin shall be imported into the Rio Grande Basin by the United States or Colorado or New Mexico, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

ARTICLE XI.

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory State to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory

State to the injury of another. Nothing herein shall be construed as an admission by any signatory State that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

ARTICLE XII.

To administer the provisions of this Compact there shall be constituted a Commission composed of one representative from each State, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex-officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas shall be appointed by the Governor of Texas. The President of the United States shall be requested to designate a representative of the United States to sit with such Commission, and such Representative of the United States, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commissioners for the three (3) States shall be paid by their respective States, and all other expenses incident to the administration of this Compact, not borne by the United States, shall be borne equally by the three (3) States.

In addition to the powers and duties hereinbefore specifically conferred upon such Commission and the Members thereof, the jurisdiction of such Commission shall extend

only to the collection, correlation, and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon matters connected with the administration of this Compact. In connection therewith, the Commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective States. Annual reports compiled for each calendar year shall be made by the Commission and transmitted to the Governors of the signatory States on or before March 1st following the year covered by the report. The Commission may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any Court or tribunal which may be called upon to interpret or enforce this Compact.

ARTICLE XIII.

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent

of the Compact by unanimous action of the Commissioners; and until any changes in this Compact are ratified by the Legislatures of the respective States and consented to by the Congress, in the same manner as this Compact is required to be ratified to become effective.

ARTICLE XIV.

The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico.

ARTICLE XV.

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory States admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

ARTICLE XVI.

Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian Tribes, or as impairing the Rights of the Indian Tribes.

ARTICLE XVII.

This Compact shall become effective when ratified by the Legislatures of each of the signatory States and con-

sented to by the Congress of the United States. Notice of ratification shall be given by the Governor of each State to the Governors of the other States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of each of the signatory States of the consent of the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

(Signed) M. C. HINDERLIDER
(Signed) THOMAS M. McCLURE
(Signed) FRANK B. CLAYTON

Approved
(Signed) S. O. HARPER

APPENDIX B

Reclamation Act of June 17, 1902

Sec. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the

same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: PROVIDED, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

* * * * *

Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: PROVIDED, That when the payments required by this

Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: PROVIDED, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

* * * * *

SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or used of water in, to, or from any interstate stream or the waters thereof: PROVIDED, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irri-

gated, and beneficial use shall be the basis, the measure, and the limit of the right.

* * * * *

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Approved, June 17, 1902.

APPENDIX C

Act of February 25, 1905
33 Stat. 814

"That the provisions of the reclamation act approved June seventeenth, nineteen hundred and two, shall be extended for the purposes of this act to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the Territory of New Mexico, on the Rio Grande, to store the flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory."

APPENDIX D

Act of June 12, 1906
34 Stat. 259

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, be, and the same are hereby, extended so as to include and apply to the State of Texas.

Approved, June 12, 1906.

APPENDIX E

Section 22 of Chapter 102
Laws of 1905
36th Legislative Assembly of the
Territory of New Mexico

Whenever the proper officers of the United States, authorized by law to construct irrigation works, shall notify the territorial irrigation engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory,

except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized.

Section 40 of Chapter 49
Laws of 1907
37th Legislative Assembly of the
Territory of New Mexico

Whenever the proper officers of the United States, authorized by law to construct works for the utilization of waters within the Territory, shall notify the territorial engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory for a period of three years from the date of said notice, within which time the proper officer of the United States shall file plans for a proposed work in the office of the territorial engineer for his information, and no adverse claim to the use of water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of the water described in such notice as may be formally released in writing by an officer of the United States, thereunto duly authorized: Provided, That in case of failure to file plans or the proposed work within three years, as herein required, the waters specified in the notice given by

the United States to the territorial engineer shall become public waters, subject to general appropriations.

APPENDIX F

New Mexico "Enabling Act"
36 Stat. 557, at 559

Seventh. That there be and are reserved to the United States, with full acquiescence of the State, all rights and powers for the carrying out of the provisions by the United States of the Act of Congress entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory.

APPENDIX G

Art. XXI
Constitution of New Mexico
Sec. 7. (Reclamation Projects.)

There are hereby reserved to the United States, with full asquiescence of the people of this state, all rights and powers for the carrying out of the provisions by the United States of the act of congress, entitled, "An act appropriating the receipts from the sale and disposal of public lands in certain states and territorie to the construction of irrigation works for the reclamation of arid lands," approved

June seventeenth, nineteen hundred and two, and acts amendatory thereof or supplementary thereto, to the same extent as if this state had remained a territory.

APPENDIX H

Article 16, Section 59 of the Constitution of the State of Texas

Sec. 59. (a) The conservation and development of all the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflow lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to

exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

(c) The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment and all such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as amy (may) be prescribed by law and shall also, authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds; and also for the maintenance of such districts and improvements, and such indebtedness shall be a lien upon the property assessed for the payment thereof; provided the Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted. Added Aug. 21, 1917, proclamation Oct. 2, 1917.

APPENDIX J

Sections 1, 2, and 92 of the Charter of the City of El Paso

Section 1. That all the inhabitants of the City of El Paso, in El Paso County, Texas, as the boundaries and limits of said city are herein established or may be here-

after established shall constitute and continue to be a body politic and corporate by the name and style of the "City of El Paso," and as such they and their successors by that name shall have perpetual succession, and shall have, exercise and enjoy all the rights, immunities, powers, privileges and franchises now possessed and enjoyed by the said city as well as those herein granted or conferred; and shall be subject to all the duties and obligations now pertaining to or incumbent upon said city as a corporation not inconsistent with this Act; they shall be known by the same name in law and thereunder shall be capable of suing and being sued, impleading or being impleaded, answer and being answered in all courts and places, and in all matters whatsoever; of contracting and being contracted with; may take, acquire, hold and purchase, lease, grant, sell or convey such property, real, personal, or mixed, as the needs or purposes of the corporation may require, either within or without the limits of the city, including real estate without the limits of the City of El Paso, for the burial of the dead, for the erecting or operation of waterworks to supply the city with water, for the establishment and operation of gas or electric light works to supply the city with light, for the establishment of a hospital or hospitals for the reception of persons afflicted with contagious or other diseases, for public parks, for a poorhouse or poorhouses, a workhouse, house of correction, rock pile or quarries for the employment of city convicts, and for any other purpose authorized

by this Act; to have a corporate seal, and to prescribe and alter the same at will.

GENERAL POWERS

Section 2. The City of El Paso shall have power to enact and to enforce all ordinances necessary to protect health, life and property, and to prevent and summarily abate and remove nuisances, and to preserve and enforce the good government, order and security of the city and its inhabitants; to protect the lives, health and property of the inhabitants of said city, and to enact and enforce any and all ordinances upon any subject; provided, that no ordinance shall be enacted inconsistent with the laws of the State of Texas, or inconsistent with the provisions of this Act; and provided, further, that the specification of particular powers shall never be construed as a limitation upon the general powers herein granted; it being intended by this Act to grant to and bestow upon the inhabitants of the City of El Paso full power of self-government, and it shall have and exercise all powers of municipal government not prohibited to it by this Charter or by some general law of the State of Texas, or by the provisions of the Constitution of the State of Texas.

Section 92. To provide, or cause to be provided, the city with water; to make, regulate and establish public wells, pumps, and cisterns, hydrants and reservoirs in the streets or elsewhere within the city or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants; to prevent the unnecessary waste of water,

and to make, establish and regulate all irrigation ditches and have entire control of the same.

APPENDIX K

Revised Civil Statutes of Texas
Articles 7547, 7548, 7549, 7587, 7588, 7622, 7653, 7657, 7752, 7807-d—Sec. 6, 7880-53

* * * * *

Art. 7547: Any person, association of persons, corporation, water improvement or irrigation district having in possession and control storm, flood or rain waters conserved or stored, under the provision of this Act, may enter into contract to supply same to any person, association of persons, corporation, water improvement or irrigation district having the right to acquire such use; provided that the price and terms of such contract shall be just and reasonable and without discrimination and subject to the same revision and control as hereinafter provided for other water rates and charges; provided, that if any person shall use such stored or conserved water without first entering into contract with the party having stored or conserved the same, such user shall pay for the use thereof such charges or rental as the board shall find to be just and reasonable, and subject to revision by the court, as herein provided for other water rates and charges.

Art. 7548: For the purpose of conveying and delivering storm, flood or rain water from the place of storage to the place of use, as provided in the preceding section, it shall be lawful for any person, association of persons, corpora-

tion, water improvement or irrigation district to use the banks and beds of any flowing natural stream within this State, under and in accordance with such rules and regulations as may be prescribed by the board of water engineers, and such board shall prescribe rules and regulations for such purpose. No person, association of persons, corporations, water improvement or irrigation district who has not acquired the right to the use of such conserved or stored waters, as provided in the last preceding Section, shall take, use or divert same.

Art. 7549: Any person, association of persons, corporation, water improvement or irrigation district, or the agent, officer, employee or representative of any such person, association of persons, corporation, water improvement or irrigation district, who shall wilfully interfere with the passage of, or take, divert or appropriate such conserved or stored water during the passage and delivery thereof, as provided in the last two preceding articles, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment, and each and every day that such taking, diversion or appropriation may be made shall constitute a separate offense.

* * * * *

Art. 7587: When, in the examination of any irrigation or reclamation project, under the provisions of the Act of

Congress, known as the Reclamation Act, approved June 17, 1902, it shall be found advisable or necessary to irrigate or reclaim lands within the limits of this State, the Secretary of the Department of the Interior is authorized to make all necessary examinations and surveys for, and to locate and construct irrigation or reclamation works within this State, and to perform any and all acts necessary to carry into effect the provisions, limitations, charges, terms and conditions of said Reclamation Act.

Art. 7588: The provisions of this Act shall in all things apply to the construction, maintenance and operation of any irrigation works in this State, constructed under what is known as the Federal Reclamation Act, approved June 17, 1902, and the amendments thereto, insofar as the provisions of this Act are not inconsistent with said Act of Congress, or the amendments thereto, or the regulations prescribed by the Secretary of the Department of the Interior in conformity to such Reclamation Act and the amendments thereto.

* * * * *

Sec. 137. Nothing in this Act contained shall be held or construed to alter, affect, impair, increase, destroy, validate or invalidate any existing or vested right of property existing at the date when this Act goes into effect.

* * * * *

Sec. 139. Chapter 171 of the General Laws of the regular session of the Thirty-third Legislature, and all other

laws and parts of laws in conflict with the provisions of this Act are hereby repealed.

* * * * *

(Effective June 19, 1917)

Art. 7622. Water improvement districts established

The County Commissioners' Court of any county in this State at any Regular or Called Session thereof may establish one or more Water Improvement Districts in their respective counties, or parts of such districts therein, in the manner hereinafter provided. Such districts may or may not include within their boundaries, villages, towns, cities and municipal corporations, or any part thereof, but no land shall be at the same time included within the boundaries of more than one Water Improvement District created under this Chapter. Such districts when so established may make improvements or may purchase improvements already existing, or may purchase improvements and make additions thereto, or may contract with any other Water Improvement District, Water Control and Improvement District, or any Conservation and Reclamation District for a water supply and may purchase or make such improvements as may be necessary to receive and distribute such water supply, and may incur indebtedness to fully carry out each and all of the purposes of its organization, and may issue bonds in payment therefor, as herein provided. Such districts being authorized to provide for the irrigation of the land included therein, and when operating under Section 59 of Article 16, of the Constitution, furnish water for domestic, power and commercial purposes. Such dis-

tricts may be formed for cooperation with the United States under the Federal Reclamation Laws for the purpose of the construction of irrigation works, including drainage works, necessary to maintain the irrigability of the land for the purchase, extension, operation or maintenance of constructed works or for the assumption, as principal or guarantor, of indebtedness to the United States on account of district lands. (Acts 2nd C. S., 1919, p. 65, part §1; Acts 1929, 41st Leg., 2nd C. S., p. 7, ch. 6, §1.)

Art. 7653. Contract with United States

The board of directors, on behalf of said district, may enter into any obligation or contract with the United States for the construction, operation and maintenance of the necessary work for the delivery and distribution of water therefrom, or for the drainage of district lands or for the assumption of indebtedness to the United States for district lands, *or for the temporary rental of water from the United States for district lands or a part thereof*, under the provisions of the Federal Reclamation Act, and all acts amendatory thereof or supplementary thereto, and the rules and regulations established thereunder: *or the board may contract with the United States for a water supply under any Act of Congress providing for or permitting such contract*, and in case contract has been or hereafter may be made with the United States as herein provided, bonds of the district may be deposited with the United States at ninety (90) percent of their par value, to the amount to be paid by the district to the United States under any such contract, the interest on said bonds to be

provided for by assessment and levy as in the case of other bonds of the district, and regularly paid to the United States to be applied as provided in such contracts, and if bonds of the district are not so deposited it shall be the duty of the board of directors to include as part of any levy or assessment now provided for by law, an amount sufficient to meet each year all payments accruing under the term of any such contract; and the board may accept on behalf of the district appointment of the district as fiscal agent of the United States in connection with any Federal reclamation project, whereupon the district shall be authorized to so act, and to assume the duties and liabilities incident to such action, and the said board shall have full power to do any and all things required by the Federal statutes now or hereafter enacted in connection therewith and all things required by the rules and regulations now or that may hereafter be established by any department of the Federal Government in regard thereto. (Acts 1917, p. 179, §21.)

Art. 7657. Property conveyed to United States

Any property acquired may be conveyed to the United States in so far as the same shall be necessary for the construction, operation and maintenance of works by the United States for the benefit of the district under any contract that may be entered into thereunder.

Art. 7752. Expense estimated

* * * The directors of all districts shall within ten days after any assessment is due, post in a public place in said district a list of all such delinquents and shall thereafter

keep posted a correct list of all such delinquents; provided, however, that if the parties owing such assessments shall have executed notes and contracts as hereinbefore provided, they shall not be placed upon such delinquent list until after the maturity of such notes and contracts. In the event that contract shall be made with the United States, the remedies in this section hereinbefore provided in favor of the district shall apply with regard to the operation and maintenance and rental charges which may become due to the United States. Provided, however, that the Federal Reclamation Laws, and in particular, the Reclamation Extension Act approved August 13, 1914, and any Acts amendatory thereof shall be applicable. Moreover, all water, the right to the use of which is acquired by the district under contract with the United States, shall be distributed and apportioned by the district in accordance with the Acts of Congress, and rules and regulations of the Secretary of the Interior, and the provisions of such contract in relation thereto. (Acts 1923, p. 379, §95; Acts 1927, 40th Leg., p. 138, ch. 90, §1.)

Art 7807d—Sec. 6. Cooperation with United States

Water Power Control Districts and Water Improvement Districts and Irrigation Districts included within Water Power Control Districts are fully authorized and empowered to cooperate with the United States under the National Industrial Recovery Act, and/or Federal Reclamation laws, and/or any and all laws of the United States applying to the aid of public works furnishing or securing funds for any and all purposes coming within the powers of such

Districts so organized and concerning or pertaining to the conservation and use and control of water for any and all lawful purposes. The provisions hereof that such Districts may so cooperate with the United States is not intended as a limitation upon their power to operate as a Water Improvement District.

Art. 7880-53. Contract with United States

Any district authorized under Section 59, Article 16, of the Constitution, with the object, among other things, of irrigating arid land, is hereby empowered through its board of directors to contract with the United States of America for the purpose of providing for the investigation, construction, extension and operation and maintenance of any Federal reclamation project of benefit to the district and authorized under the National Reclamation Act of June 17, 1902 (Thirty-second United States Statutes at Large, page 388), and acts now and hereafter amendatory thereof or supplementary thereto, and all herein styled the National Reclamation Law, and the securing of a district water supply therefrom, and to pay to the United States the agreed cost thereof in the form of construction charges, operation and maintenance charges, and water rental charges, as shown by such contract and in accordance with the terms and conditions of the National Reclamation Law, and the regulations now and hereafter promulgated thereunder. The construction charges may include the cost of drainage and flood control works necessary to control floods or to maintain the irrigability of district land, and the cost of incidental electric power and municipal water

service made feasable through the water supply of the reclamation project. Every such contract involving the payment of construction charges to the United States shall be voted upon by the electors of the district as in the case of an issue of district bonds, and the provisions of this Act relating to the election upon, approval and validation of such bonds shall be followed, so far as applicable, including the prosecution of an action in court to determine the validity of the contract. The notice of election shall state the maximum amount, exclusive of operation and maintenance charges, water rental charges, interest and penalties, payable by the district to the United States under the contract and the ballot shall contain the following words; and no others: "For contract with the United States of America and levy of taxes and payment therefor," and "Against contract with the United States of America and levy of taxes and payment therefor." Any such district may convey real property to the United States in connection with the construction or operation and maintenance of Federal reclamation works used or to be used for the benefit of the district. Where a contract is made under this section, between a district and the United States, providing for use by the district of Federal Reclamation works, the district need not prepare or file any engineering data respecting the construction of such works. Until all moneys receivable by the United States from any such district under any such contract shall have been fully paid, the boundaries of such district shall not be altered without the consent of the United States. Any such district contracting with the United States under this section shall annually levy taxes

in amount to provide payment of all installments of charges as required by the contract and the district may, under authority of a vote of the district electors as provided in this Act, apportion benefits and levy and collect taxes on a benefit basis instead of on an ad valorem basis, and may when provided by contract make payment of construction charges on the basis of the average gross annual acre income of the lands of the district or designated divisions or subdivisions thereof, as such annual gross acre income is determined by the Secretary of the Interior. The annual levies of assessments shall be sufficient to collect the amount of money required to meet all the district's obligations in full when due notwithstanding any delinquency in payment of assessments by any tract of land. If collections in any year prove insufficient to meet the obligations of the district, the levy shall be increased the following years to a sufficient extent to cover the deficit. The annual levies for payment of construction charges shall continue to be made each year against each tract of land in the district until the full amount apportioned against the same has been paid notwithstanding that such construction charges apportioned against other tracts of land in the district may sooner or later be paid out. The lien against district lands on account of any such contract with the United States shall be superior and dominant to the lien on account of any district bonds approved subsequent to date of such contract.